No. 10783

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

18

ELMER MATEAS,

Appellant,

vs.

FRED HARVEY, a corporation,

Appellee.

BRIEF OF APPELLEE FRED HARVEY, A CORPORATION.

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All references are to pages of the transcript of record.

I.

Pleadings and Record.

The amended complaint alleges in substance [16-20] that the appellee, a New Jersey corporation, maintained a resort on the south rim of the Grand Canyon in Arizona; that it maintained two trails from said rim to its base, known respectively as the Phantom Ranch and Bright Angel trails; that it also maintained mules for the purpose of carrying passengers on the Bright Angel trail; that appellant bought and paid for a ticket for this excursion down the Bright Angel trail, informing the appellee at that time that he had never ridden a mule, was

inexperienced with either mules or horses, and that he desired a suitable, safe and fit animal; that appellant, on or about June 27, 1942, started on the excursion on mule back as a member of a party of seven, presided over and guided by one Bob Ennis, an employee of the appellee; that appellant was assigned to a mule known as "Chiggers," with the position of last in the line of mules; that appellant did not know the previous history of that mule.

All of these allegations are admitted by appellee.

The amended complaint further alleges [19-20] that this was the first time this mule "Chiggers" had ever been up or down the Bright Angel trail before or during 1942; that it was the first time the mule had carried any excursionist on his back; that for a period of approximately two years previously this mule had only carried a pack or merchandise; that the mule was not accustomed to carrying persons; that these facts were well known to the appellee and that the appellee should have known that the said mule was not at all suitable, or fit to be used for the purpose for which it was provided, and was not a safe mule to be ridden in such place under such circumstances and conditions, and by a person wholly unfamiliar with riding either horse or mule.

All of these allegations are denied by appellee.

The amended complaint then alleges [20-21] that when the party, including appellant, reached a place on the Bright Angel trail about five miles below its rim, the mule, without any act or thing done upon the part of the appellant, suddenly bucked and jumped and threw the appellant so that the appellant fell upon his back on the roadway.

Appellee admitted in its answer that the appellant fell from the mule, but denied for lack of information and belief the remainder of these allegations [24-25].

The rest of the amended complaint [21-22] alleged appellant's injuries or damages, which were denied by appellee for want of information or belief [25].

The appellee pleaded as affirmative defenses that the accident referred to was inevitable and unavoidable in so far as it was concerned, and that the appellant had voluntarily assumed any risk incident to riding the mule.

On page 2 of his opening brief, appellant states that at the close of his case appellee made the following motion:

> "We move for a non-suit and make a motion to dismiss this action, no proof of any breach of any warranty that the mule was of a not fit and proper character * * *."

Then, on page 3, appellant apparently contends that the motion was not sufficient in form because it did not sufficiently specify the grounds thereof, nor state the particular ground upon which it was based.

Even this short quotation from appellee's motion clearly does specify the grounds of the motion and the particulars upon which it was based. However, the said quotation consists only of the opening sentence of appellee's motion. The entire motion very clearly sets forth the particular grounds upon which the motion was based. We, therefore, quote it in full [134-135]:

> "Mr. Schell: We move for a non-suit and make a motion to dismiss this action, no proof of any breach of any warranty that the mule was of a not

fit and proper character. In other words, there is no evidence here showing either negligence or any breach of warranty on which a possible recovery could be had; and we submit that all of the testimony shows, and that all the testimony does show, is that on this particular ride the mule bucked when he—after he had been out four or five hours, and he bucks and the plaintiff fell off, and that is the sum total of anything and is certainly no proof of any breach of warranty, or negligence, or failure to comply with the statute; and, furthermore, the allegations in the complaint are that this mule had never been ridden before and this was his first trip; he had always been used as a pack mule for times before, and plaintiff's affirmative proof shows the mule had been ridden by the so-called 'dude' for at least two years prior to the happening of this accident.

The Court: All right. Mr. Lincoln, you want—

Mr. Lincoln: Under Your Honor's ruling I have no answer to that. I think if there is any question as to the proof, however, we should be permitted to amend to conform to the proof, in that it makes no particular difference perhaps in the final analysis; any slight question as to whether the mule had been ridden this year, or whether for the first time, or whether it had been ridden this year on this trip for the first time, I don't know that it makes any difference in so far as our proof or plaintiff's is concerned."

No amendment to conform to proof, or otherwise was ever presented by appellant.

II.
Statement of Facts.

Appellant's statement of the case is not quite accurate where he states, on page 5 of his brief:

> "Bob Ennis was the guide, a boy about 18 years old. He had been accustomed to horses since he was three—so his father said."

Actually his father testified that he took Bob into the Canyon when he was three years old, put him on a *mule;* that he looked back and said, "Dad, I am your guide," and that he had been riding ever since and had been handling *mules* or horses ever since [44].

On page 7 of his brief, appellant quotes from page 79 of the transcript as follows:

> "And we were just rounding, going through a little dip and into a bend, and the mules were *struggling,* like they are inclined to do, and Bob, our guide, told us to close up the mules, and he stopped at the head to let the mules close up; . . ." (Italics ours.)

That the word the witness actually used was *straggling* is perfectly obvious from the context [79].

In addition to the facts set forth by appellant, we would call the Court's attention to the following additional, uncontradicted evidence in the case.

The witness Emmet Ennis, called as such on behalf of the appellant, testified that there were three trails, known respectively as the Bright Angel, the Kaibib and Yankee trails [38]; that he was in charge of all transportation, including transportation by mules; that when mules were purchased they were first put on a pack train and broken to a halter. They started with just a light saddle on them,

maybe a couple of canteens of water. Additional burdens were put on until the mules could handle a load and learn the trail. Then the packer rode them part of the way back up the trail, changing his saddle from one mule to another so that they become broken to being ridden. The bulk but not all of this training took place on the Kaibib trail [47-48]. The period of training varied from one to two years according to the different dispositions of the mules, and the disposition was generally determined by the packer in conjunction with the trail foreman [41]. When the trail foreman and the packer thought the mules are gentle enough they are brought into buildings, or barns, at the heads of the trails. Guides are put on them and they are ridden for a certain length of time until the guides determine that mules are safe for "dudes" to ride. All persons riding the mules other than the packers or guides are termed "dudes" [43-48].

Before starting on a trip, the trail foreman and the guides size the people up as to their weight, and then assign them to a mule according to that weight, because they know what weight a mule can handle. The weight a mule can handle does not necessarily depend on the size of the mule [44-45].

The particular mule in question, "Chigger," was in the pack train in 1938 and 1939, being used as a guide mule and occasionally ridden by the packer. In 1940 he went into the "dude" string on the Bright Angel trail [126-127].

Witness John Bradley, also called on behalf of the appellant, corroborated the testimony of witness Ennis that for the first year or so "Chigger" was used on the pack trains, began its "dude" training in 1940, and

continued on "dude" trains from 1940 up to June, 1942 [128-129].

The appellant and his wife testified that it took about two to three hours to reach Indian Gardens from the start of the trip at the rim; that the entire party dismounted and had lunch; that the accident occurred from about one-half to one hour after the party left Indian Gardens [57-102].

With regard to the conduct of the mule on the way down the trail, the plaintiff testified [58]:

> "Well, just by walking along like the rest he would suddenly try to squeeze through the other mules and get away over the line, away from the end of the line, try and squeeze up through the trial, get out in front,"

and that he did this on more than one occasion.

The plaintiff's wife in this regard testified [78] that on the way down a number of times the mule tried to squeeze past the rest of the party, doing so on the drop side of the Canyon.

Both the appellant and his wife testified that the mule did not buck at all before arriving at Indian Gardens [58, 78]. In fact there is no testimony whatsoever that the mule bucked at any time until the actual occasion when the appellant was thrown off.

The trail foreman, John Bradley, called as a witness for the appellant, testified that he was trail foreman, that he knew the mule "Chigger," and that he had never received a report before this accident that the mule had bucked [127, 128-130].

III.

The Law Applicable to This Case.

Appellant himself clearly states the law applicable to this case when he says, on page 12 of his brief, as follows:

> "In the ordinary contract of hiring of a horse or mule to be used to ride, the owner of the animal warrants
>
> 'against defects or vicious habits which he knows, or by the exercise of proper care could know; and if he fails to exercise such care and it occasions injury to his customer he will not be relieved of liability, though he did not actually know the horse was unsuitable for the purpose * * *.'
>
> *Dam v. Lake,* 6 Cal. 395, page 400;
>
> *Kersten v. Young,* 32 Cal. App. (2d) 1, page 6."

In addition to the above quotation from *Dam v. Lake Aliso Riding School,* 6 Cal. (2d) 395 (erroneously referred to as 6 Cal. in appellant's brief) we would call the Court's attention to the further wording of the Court on page 400:

> " 'In the case at bar, therefore, the questions were whether the mare was vicious and unsuitable for the purpose for which she was hired, and whether the defendant knew, or by the exercise of reasonable care should have known, the fact. The burden of establishing both propositions was on the plaintiff.'
>
> We are of the opinion that the foregoing statement by the Supreme Court of Pennsylvania in the Conn case exhibits the reasonable rule which should be approved and applied here. Under this rule the so-called implied warranty is not a warranty in that

sense which insures the suitableness of the horse, but is only a contractual obligation assumed against reckless or heedless hiring out of a horse without reasonable care to ascertain the habits of the animal with respect to its safety and suitability for the purpose for which it is hired."

In this quotation, in this connection, appellant also refers to the case of *Kersten v. Young,* which he cites as 32 Cal. App. (2d) 1, page 6. As there is no such case, we assume the reference is to *Kersten v. Young,* 52 Cal. App. (2d) 6, which affirms the rule in the *Dam v. Lake* case.

The same rule is again set forth by appellant, on page 14 of his brief, in the following quotation from *Heath v. Fruzier,* 50 Cal. App. (2d) 598, as follows:

> " 'A well established general rule is that the owner of a dangerous or vicious animal who has knowledge that it is such an animal, is liable for any injuries it may inflict upon another, unless such other person voluntarily or consciously does something which brings the injury upon himself.' "

Again we might add to appellant's reference to this case by further quoting from page 600:

> "The gist of the action is not the manner of keeping the vicious animal, but the keeping of him at all with knowledge of the vicious propensities."

Appellant cites *Ficken v. Jones,* 28 Cal. 618 (page 13 of the opening brief), which case involves injury done by cattle driven through the streets of a city. The case has no application to the one at bar. However, we might interrupt to point out that even in this case the Court holds that it was proper for the defendant to show in defense

that the persons in charge of the cattle were persons of competent skill in the business. This is interesting in view of the evidence introduced by appellant himself in the present case that the guide, Bob Ennis, had been accustomed to handling mules and horses since he was three years old.

The case of *Hammond v. Melton,* 42 Ill. App. 186 (page 13 of the opening brief) did not have the slightest bearing on the present case, unless it could be said, as a matter of law, that the known propensities of mules are such as to render them unfit for use in carrying persons. Of course exactly the reverse is true.

Appellant cites *Roberts v. Griffith,* 100 Cal. App. 456 (page 13 of the opening brief). This case merely holds that it is negligent to allow horses or mules to run at large and unattended on the streets of a municipality.

Appellant cites *Fererira v. Silvey,* 38 Cal. App. 346 (page 14 of the opening brief). This case involved a run away team of mules. The Court affirmed a judgment for the plaintiff because there was evidence that the defendant was thoroughly familiar with the vicious and dangerous nature of the particular mule and of its predilection for running away (page 350, 353).

Appellant then cites, page 14, the case of *Conn v. Hunsberger,* 224 Pa. 154. In this case a mare was harnessed to a light wagon and rented to the plaintiff. The plaintiff started to drive about the city. Within half an hour after the animal was hired it suddenly, without any apparent cause, started to kick violently and finally ran off. The animal kicked the dash board off, hit the plaintiff above the eye and kicked the seat from under the plaintiff. While the animal was running away, the

wagon violently struck a truck standing on the street and plaintiff was thrown out. *Plaintiff called expert witnesses to testify to the conduct of the mare on the occasion of the accident, showing that she was not mild, kind and gentle, but was wild and vicious, and that a gentle horse would not act as she did.*

In quoting from this case, appellant does not complete the quotation. We shall now do so, as follows:

> "His warranty is against defects or vicious habits which he knows or by the exercise of proper care could know, and if he fails to exercise such care and it occasions injury to his customer, he will not be relieved of liability though he did not actually know the horse was unsuitable for the service."

We have no quarrel with the authorities cited by appellant on page 15 of his brief, that knowledge of a servant is imputed to his master, but before any such imputation can take place there must have been such knowledge upon the part of that servant. The present case is devoid of any evidence that the rule in question had any dangerous propensities. Naturally, therefore, it is devoid of any evidence that any employee of the appellee knew of any such dangerous characteristics. The question of imputation of such knowledge therefore becomes entirely mute.

The law is clear in that before appellant could recover in this case the evidence would have to show

1. That the mule was in fact unfit for the purpose for which it was being employed, and
2. That the appellee had, or in the exercise of reasonable care, should have had knowledge of such fact.

As the record is completely devoid of any evidence in support of either of these propositions, the trial court was required to grant appellee's motion to dismiss, and its action in so doing should be affirmed.

Failure on the Part of Appellant to Establish the Essential Allegations of His Amended Complaint.

The allegations of the amended complaint charging liability on the part of appellee are:

1. That one Bob Ennis, an employee of appellee, acted as guide for the party of which appellant was a member, and had the mules under his sole control, charge and management.
2. That the occasion of the accident was the first time that this mule had ever been down the Bright Angel trail [19.]
3. That it was the first time the mule had been up or down the trail in 1942 [19].
4. That it was the first time the mule had carried any excursionist on his back [19].
5. That the mule was not accustomed to carrying any person [19].
6. That appellee knew that the mule was not suitable or fit to be used for the purpose for which it was provided, and was not a safe mule to be ridden in such place under such circumstances and conditions and by a person wholly unfamiliar with riding either horse or mule [20].

We will now consider each of these allegations in the above order:

1. **That One Bob Ennis, an Employee of Appellee, Acted as Guide for the Party of Which Appellant Was a Member, and Had the Mules Under His Sole Control, Charge and Management.**

The evidence shows that Bob Ennis was an employee of appellee, that he acted as a guide for this particular excursion and had general control, charge and management of the mules. It also shows that appellee's employees, including Ennis, designated the particular mules which each member of the party was to ride.

The evidence, however, negatives the *sole* control, charge and management of the mules by Ennis, since obviously their riders had a certain amount of control, charge and management of the mules being ridden by them.

It is true that the evidence shows that at the suggestion of a Mr. Boles he and the appellant exchanged mules; that after they had done so Ennis came back checking; that appellant then told him that he had changed mules because he could not handle the mule he was on, but that Mr. Boles could handle any mule; that Ennis told them to return to their original mules and that they did so. Neither appellant nor any other witness testified as to any objection or protest being made by appellant to the making of this change back. Apparently both appellant and Mr. Boles acquiesced quite willingly to this change back to their original mules.

There is not a vestige of evidence that Ennis was not a fully competent person to act as such guide. The only evidence on the point was that he had been accustomed to handling mules and horses since he was three years old [45].

2. **That the Occasion of the Accident Was the First Time That This Mule Had Ever Been Down the Bright Angel Trail.**

The evidence is directly to the contrary. Not only was there the testimony of the training given to the mules used for carrying persons, but there was direct testimony with regard to this particular mule, namely, that he had been on the Bright Angel Trail since 1940 [126-127.]

3. **That It Was the First Time the Mule Had Been Up Or Down the Trail in 1942.**

The evidence did show this to be the fact. However, the evidence also showed that for the two preceding years the mule had been regularly assigned to this particular trail. There is no evidence whatsoever that, with this experience behind him, his first trip in any manner entailed the slightest danger to his rider, or was the slightest degree more dangerous than any later trip.

4. **That It Was the First Time the Mule Had Carried Any Excursionist On His Back, and**

5. **That the Mule was Not Accustomed to Carrying Any Person.**

The evidence is directly to the contrary, namely, that since 1940 the mule had been on the "dude" string [127.]

6. **That the Appellee Knew the Mule Not to Be Suitable, etc.**

This is not a direct allegation that the mule was unsuitable for the purpose for which it was provided, or was not a safe mule to be ridden under such circumstances, and the amended complaint contains no direct allegation.

There is no evidence whatsoever that the mule was not a suitable or safe animal. There is no evidence that even if the mule had not been safe or suitable, that appellee had knowledge thereof. Once again, such evidence as there is on the point is to the contrary [41, 44-45, 47-48, 58, 78, 126-130.]

Thus of the allegations charging liability on the part of the appellee, the only ones established by the evidence are that Bob Ennis was the guide in charge of the party, and that this was the mule's first trip for that year on this particular trail.

We submit that it needs no argument to demonstrate that this proof is utterly insufficient to establish liability on the part of the appellee on any theory, either that of negligence or of breach of any warranty.

On the other hand, the evidence did affirmatively establish the exercise of a high degree of care on the part of appellee in the training of its mules. It will be remembered that for a year or two, according to the temperament of the particular mule, it was used as a pack train mule, during which time it was broken to a rider by being actually ridden by the packers; that it was then ridden by the guides until the guides determined that the mules were safe for "dudes" to ride, and that they were not put into "dude" strings until their suitability therefor had been determined by the trail foreman, the packers and the guides.

Not only had the particular mule involved in this case been given this training, but it had actually been used for two years to carry "dudes."

In view of this evidence, the following quotation from page 13 of appellant's brief, taken from the case of *Fererira v. Silvey,* 38 Cal. App. 346, 352, is very appropriate:

> " 'Common experience justified the observation that the average work horse or mule, having been thoroughly "broken" to harness and the ordinary burdens cast upon horses, is so gentle in his relations with those using him for the purpose to which he has been educated—that is, is so bereft of nervousness and of an inclination to become nervous, that the mere blowing of a bag of paper in front of him or near him would have no effect upon him.' "

Appellant claims that the conduct of the mule on the particular trip was such that it informed appellee's servants that it was an unsuitable animal. What was that conduct? As far as the evidence goes, the conduct of the mule was exemplary except that on several occasions it tried to get ahead of some of the other mules. Apparently appellant was able to hold the mule in place. Certainly the mule did not buck. What is there in this conduct that would have indicated that thereafter the mule would start to buck?

If it is a fact that a tendency to push ahead in a line of mules indicates a tendency to buck, then appellant could have called an expert to so testify, as was done in the *Conn* case (*Conn v. Hunsberger,* 224 P. 154). Appellant did not do so. The burden of proof was on appellant. In the absence of any such evidence, it must be assumed that the desire of the mule to get up front and his subsequent bucking have no connection whatsoever, and that the former was in nowise indicative of the likelihood of the latter. This is especially true as there is no evidence that

the only bucking done by the mule, namely, the bucking which caused the appellant's fall, occurred while the mule was attempting to pass any other animal.

Moreover, if it could be said (which, of course, it cannot) that the tendency to get ahead renders a mule vicious, and that is so well known that no evidence thereof is necessary, then the fact must also have been known to appellant, and that by consenting to remain on the mule, at least after the stop at Indian Gardens, appellant would have assumed the risk of any injury thereafter occurring to him by reason of such peculiarities.

Appellant claims, on page 17 of his brief, that appellee was a common carrier. There are many answers to this contention. The most essential element to the creation of that relationship is the holding out by the carrier of its willingness to carry any and all persons who present themselves to it for carriage, provided said persons paid the proper fare to be charged (13 *Corpus Juris Secundum, Carriers,* Sec. 530, p. 1036). There is not the slightest evidence in this case that appellee made any such holding out. There is not the slightest evidence that appellee did not reserve to itself the right to refuse to make the trip at all for any reason whatsoever. Certainly there is nothing in the evidence to show that when appellant applied for tickets for the excursion he would have had a cause of action against appellee, had the latter arbitrarily informed him that it had cancelled the excursion. Yet, had appellee been a common carrier, it would have been obliged to make the excursion in the absence of a suitable excuse. Certainly there is nothing in the evidence to show that appellant would have had a right of action against appellee had the latter arbitrarily informed the appellant that it had so reduced the number of persons it was accommo-

dating on the trip that there was no space available for appellant. Yet a common carrier, in the absence of a valid reason, may not reduce its accustomed service. Again, appellant would have had no right of action against appellee had the latter informed appellant that a sufficient number of persons had not signified their intention of joining the excursion, and, consequently, that it would not take place. Had appellee been a common carrier, it would have been obliged to make the excursion even had appellant been the only person desiring to make the trip.

In fact, there is nothing in the evidence to show that appellant would have had a cause of action against appellee had the latter arbitrarily and without any reason refused to allow the appellant to become a member of the excursion. Were appellee a common carrier, it would have had no such right arbitrarily to refuse transportation to appellant.

The evidence in this case merely shows a typical example of a livery stable proprietor who arranges conducted excursions for his patrons. Operators of livery stables are universally held not to be engaged in the business of a common carrier.

Thus it is said in 13 *Corpus Juris Secundum, Carriers,* Section 534, page 1040:

> "A livery stable keeper does not hold himself out to serve any and all persons, but operates only under a special contract, and deals with such persons only as he chooses, and is in no respect a common carrier; and the fact that he rents his vehicles with horses does not of itself make him a common carrier of passengers within the legal meaning of the term."

In *North American etc. Insurance Company v. Pitts* (Ala.), 104 So. 21, it was held that an airplane operated by an owner at a summer resort making a prescribed trip for a specified sum did not render the operator a common carrier. The analogy to the case at bar is complete.

Again, another reason exists why appellant, or those engaged in a like business, are not common carriers. In the case of common carriage, the carrier merely supplies a seat or space in a vehicle, over the operation of which the passenger has no control whatsoever. This is the element which justifies the strict rule of liability imposed on common carriers. Where there is no such regulation of sole control, the reason for the common carrier rule of liability ceases.

The difference between the situation where one rents to another a vehicle, animal or instrumentality to enable the other to make a trip, or otherwise further his business or pleasure, and that of a common carrier who merely furnishes space in or on one of its vehicles is quite obvious. If the mere renting of the means of getting some place constitutes common carriage, then every bicycle store which rents bicycles by the hour is a common carrier. In fact, if the ownership and renting of an instrumentality, even accompanied by a certain amount of supervision, constitutes common carriage, then every roller or ice skating rink is a common carrier. They rent instrumentalities of carriage, they establish the direction of travel, they have many regulations as to the use of the skates and method of skating, and they always have attendants on the floor in general supervision of the skating.

Unquestionably, both under reason and the authorities, one is not a common carrier who, instead of merely renting space in a vehicle entirely controlled by it, rents that

vehicle, or an animal, or other instrumentality, to a person for use by that person.

Therefore, both because of the absence of any evidence that appellee held itself out to carry all persons, and because of the very nature of the renting done by appellee, it cannot be held to be a common carrier.

Appellant next contends that appellee, being a common carrier, was an insurer of the safety of appellant. As we have previously shown, appellee in fact was not a common carrier, but, even if it were, still it would not be an insurer of appellant's safety, and before recovery could be had against appellee the evidence would have to establish some negligence or breach of warranty upon its part. That even a common carrier is not an insurer against accidents to its passengers is a universally and elementary rule. In this connection, we would refer the Court to the following general statement of that rule, found in 13 *Corpus Juris Secundum, Carriers,* Section 676, page 1253:

> "The general rule, as stated in Corpus Juris, which has been approved, is that a carrier of passengers is not as absolutely liable for the safety of the passengers as a carrier of goods is for the safety of the goods; but is liable only for injury to passengers which are caused by its negligence in failing to exercise the proper degree of care, skill and diligence for such passengers' safety. A carrier is not an insurer of the safety of passengers in the sense in which a carrier of goods is said to be an insurer of the safety of the goods, as stated in *supra,* Section 71, and hence is not liable for injuries caused by an accident which in the exercise of the proper degree of care, skill and diligence could not be anticipated or prevented, as stated in *infra,* Sections 678, 697."

Section 678, referred to, is as follows:

> "A common carrier of passengers should exercise such a degree of care, skill and diligence for the safety of passengers as is required by the nature and reference of the undertaking in view of the mode of conveyance and other circumstances involved."

Section 697 deals with an act of God.

See also such cases as the following, which hold that even a common carrier is not an insurer of the safety of its passengers:

Nicholson v. Porter, 118 Cal. App. 555, 557;

Sinan v. A., T. & S. F., 103 Cal. App. 703, 708;

Parker v. Manchester Hotel, 29 Cal. App. (2d) 446, 454;

Champagne v. Hamburger & Son, 169 Cal. 683, 690.

Finally, we would again cite to this Court the case of *Dam v. Lake Alïso Riding School,* 6 Cal. (2d) 395, cited by appellant as setting forth the rules governing this case, and wherein the Court says, page 400:

> "It is true a livery man is not an insurer of the suitableness of a horse or carriage let to a customer, but he is bound to exercise the care of a reasonably prudent man to furnish a horse or carriage that is fit and suitable for the purpose contemplated in the hiring."

V.

There Was No Negligence or Breach of Warranty on the Part of Appellee.

Appellant says, page 8 of his opening brief, that this Court will take judicial notice of the following facts: That a horse is not a mule; that the two animals, being bred differently, have not the same peculiarities of temperament any more than does an American as contrasted with a Japanese; and that a horse, or mule, which has been in pasture all winter until the middle of June has more vim, vigor and vitality than a similar animal which has been working during the same period.

Appellant contends that these facts were well known to appellee but *were not and could not have been known to appellant.* Ignorant though appellant may have been of mules, we are inclined to doubt his ignorance as to these particular matters.

We readily concede that a mule is not a horse, and that the two animals have not the same peculiarities of temperament. We, however, fail to see where this leads us.

Again, granting that either a horse or a mule just taken in from pasture may have more "vim, vigor and vitality" than had he been working, this does not show that he, therefore, possesses so much "vim, vigor and vitality" as to render him dangerous to ride.

Moreover, appellant does not seem to draw any conclusion from the above differences between horses and mules, apparently known to everyone except himself, unless it be that he would infer that a mule is *per se* an improper animal to be ridden unless he has been somewhat exhausted by a long period of hard work. We do not believe such to be either the fact or the law.

Appellant then continues, on page 8 of his brief, that the rule of law applicable to livery stable keepers and riding academies is to some degree applicable to the present case, but that the circumstances are radically different.

Unfortunately appellant does not point out the degree to which these cases are applicable, or more particularly, the degree to which they are inapplicable. We submit that these cases are directly and fully applicable to the present case and, in fact, are controlling herein.

Appellant then says, pages 8-9 of the opening brief, that when a livery stable rents a horse it places that animal immediately and conclusively beyond its control, although in such cases the drive would take place upon a level road or highway, that in the riding academy cases the animal is ridden upon a level highway or road, is subject to the control and peculiarities of the rider, and that the "riding academy guide or teacher," if there is one, has no control over the animal.

Of course there is no evidence dealing with any of these matters. We do not believe that when one rents a horse for a ride he always remains on a level road or highway. The personal experience of the writer of this brief is directly to the contrary.

Again we fail to see why a "riding academy guide or teacher" should have less control over the horses ridden by his party or his pupils than had Ennis over the mules in the present case. We submit that it is not unusual for a "riding academy guide or teacher" to place himself in the lead of a party going on an excursion on horseback in mountainous country.

Appellant then says, on page 9 of his brief, that conditions also differ in that he called the attention of appellee to the fact that he had never ridden before; that the par-

ticular mule was selected by an employee of appellee, and that the trip was not upon a public highway by a wide, smooth, well traveled roadway, but down a steep incline following the contours of a cliff and only four to six feet wide.

Again it seems to us that exactly these conditions, except the steep incline following the contours of a cliff, are extremely normal in cases where horses rather than mules are rented.

Since the Court is asked by appellant to take judicial notice of the characteristics of horses and mules, we assume it will also take judicial notice that a mule is a much more sure-footed animal than a horse, and is much safer to use on these steep inclines.

While we fail to see the analogy between the dog bite cases and the case at bar, it must be remembered that *in the absence of contrary statutory enactment* the rule still is that "every dog is entitled to his first bite." If there is an analogy, then it must be that "every mule is entitled to his first buck."

If we read appellant's brief correctly, starting with page 10 thereof, appellant admits that there is no evidence whatsoever showing "any vicious, improper or incorrect mannerisms of this particular mule before he was mounted by appellant.

However, appellant does claim that between the time he mounted the mule and the accident, the mule did display such traits.

The only evidence in the record with regard to the conduct of the mule on the trip is that of the appellant and his wife. Appellant testified that the mule did not buck at all before he reached Indian Gardens [58-78]. His

wife testified that she did not see the mule buck at all preceding the accident [58].

Both appellant and his wife testified that on more than one occasion while *walking along like the rest of the mules,* this particular mule would suddenly try to squeeze through the other mules and get out in front [58, 78]. Apparently appellant was successful each time in restraining the mule, as there is no evidence that the mule was successful in passing any of the other animals.

Likewise there was no evidence that the mule bucked during any of these attempts to get out of line. Likewise there is no testimony that when the mule did buck he was endeavoring to get out of his place in the line.

There is therefore no evidence in the case showing that the inclination of the mule on this particular time to get out of his proper place in line had anything to do with his subsequent bucking or with the accident to appellant.

We submit that this tendency on the part of the mule to try and get ahead of some of the other mules is far from sufficient to establish that the mule was vicious, unsafe to ride or an improper animal to entrust to even an as inexperienced a rider as appellant claims to have been.

It is true that appellant, on pages 10 and 11 of his brief, draws a rather terrible picture of the dangers to which appellant was exposed because in so trying to pass the other mules he might have been precipitated over the cliff, saying that the "intense desire of the mule was almost to compel the rider to commit suicide." This argument might be of more than academic interest had the mule actually been precipitated over the cliff, or had he, in bucking appellant off, thrown him over the cliff. Fortunately no such occurrence took place. Consequently, we fail to see what application this particular argument, even if well taken, would have to the case at bar.

VI.
Conclusion.

We submit that the whole evidence in this case shows without contradiction that a mule, which had received two years of training and then had acted as a carrier of "dudes" for another two years, suddenly started to buck and threw appellant off. We submit that there is not the slightest vestige of evidence that on any previous occasion the mule had shown any viciousness or unsuitableness for the purposes for which it was being used, namely, the carrying of excursionists up and down the trail.

We submit that the evidence completely fails to show that in fact the mule was vicious, or unsafe, or unsuitable for the purpose of carrying excursionists up and down the trail, and that consequently it utterly fails to establish any breach of warranty or negligence on the part of appellee. On the contrary such evidence as is to be found in the record affirmatively shows the use of due diligence by appellee, that the mule was entirely fitted for the purpose for which it was being used and had not previously evidenced any improper tendencies.

We, therefore, respectfully submit that the evidence in this case being such as to be insufficient to have supported a judgment in favor of the appellant, either on the theory of a breach of warranty or of negligence upon the part of appellee, the trial court was not only justified but was compelled to grant appellee's motion to dismiss, and that the judgment rendered in this case in favor of appellee should be affirmed.

Respectfully submitted,

SCHELL & DELAMER,

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